IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.497 OF 2007.

Shri Pravin Niwritti Sawant
R/o 12/718, Satpute Chawl,
Ichalkaranji-416115
Dist. Kolhapur. ..Petitioner

V/s

1. Sou. Nisha Pravin Sawant
   R/o C/o Shrimant N.B. Education Society's
   N.B.Bal Vidya Mandir, Opp. Government
   Hospital, Main Road Ihalkaranji, Dist.
   Kolhapur

2. The State of Maharasthra ..Respondnts.

Mr.S.V. Marwadi, Advocate appointed for the Petitioner No.1, who is in jail

Mr.D.P.Adsule, APP for the State.

CORAM : J.H. BHATIA, J.

DATE : 23RD APRIL, 2007.

ORAL JUDGMENT.

. Mr. Marwadi, learned Advocate appointed on behalf of the petitioner, seeks leave to implead the State of Maharashtra as respondent No.2. Leave granted. Amendment be effected immediately.

2. Heard Mr.Marwadi and Mr. Adsule learned APP for the State.

3. To state in brief the respondent Nisha Sawant is the wife of the petitioner Pravin. On account of certain matrimonial disputes between the two, they were living separately. The respondent-wife filed criminal Misc.Application No. 130/1997 before the J.M.F.C., Ichalkaranji seeking the maintenance under section 125 Cr.P.C.. After hearing the parties, the learned Magistrate granted maintenance. That order was challenged by the petitioner in revision application, which was also dismissed. After that the wife and minor daughter of the petitioner filed an application for execution of that order of maintenance under section 125 (3) Cr.P.C. On 5/3/2004 a notice was issued to the petitioner. It appears that the matter was pending for long time. He did not appear nor he made any payment. On 15/6/2006 on behalf of the present petitioner, his father claiming to be holder of power of attorney for the petitioner, filed an application seeking to set aside the maintenance order, which was already confirmed in the pervious proceeding. He raised several questions in that application contending that material documents, evidence and contentions raised by the petitioner husband were not taken into consideration by the concerned Courts. However, the learned J.M.F.C.,

Ichalkaranji rejected that application on the ground that the petitioner-husband himself was absent and as he was personally required to present in the Court. The application filed by the power of attorney holder could not be entertained. This order was challenged in Criminal Revision No. 93/2006. The revision application was filed by the present petitioner through his power of attorney holder challenging the said order dated 15/6/2006. After hearing the power of attorney in person and the Counsel for the wife, the learned Additional Sessions Judge observed that when the petitioner was directed to remain personally present before the court, he could not be allowed to represent by his power of attorney. For this purpose the learned Additional Sessions Judge also relied upon **T.C. Mathai and another V. District and Sessions Judge, AIR 1999 S.C. 1385**. The learned Additional Sessions Judge observed that just to avoid his arrest and recovery proceeding pending before the Magistrate, he had adopted the method of filing the application through his power of attorney. This application came to be rejected on 27/7/2006. Meanwhile, the learned J.M.F.C. awarded the sentence of imprisonment to the petitioner for non payment of the maintenance amount and he was taken in

custody. In such circumstances, he filed the present writ petition challenging the order of the Additional Sessions Judge in Criminal Revision No. 93/2006.

4. After perusal of the record it is clear that the respondent wife had filed the maintenance application NO.130/1997 for maintenance for herself and her minor daughter wherein the maintenance was granted by the J.M.F.C., Ichalkaranji. That order was challenged before the Sessions Court in Revision Application NO. 148/2003. That Revision Application was also rejected on 17/8/2004 and thus, the order of maintenance passed by J.M.F.C. had become final. Pending that revision application, the wife and the minor daughter had filed an application under section 125(3) for recovery of arrears of maintenance amount and on 5/3/2004, on that application notice was served on the petitioner. Later on the order of maintenance passed in Misc. Application No.130/1999 was confirmed by the Sessions Court. On 15/6/2006 on behalf of the petitioner, his father claiming to be the power of attorney holder filed an application seeking to set aside the maintenance order on several grounds. The learned Magistrate rejected that application on the ground that the husband was

required to remain present personally before the court but he himself was absent and therefore power of attorney holder could not be allowed to move such application. In T.C. Mathai (Supra) Their Lordships of Supreme Court observed as follows in para 14:-

> "14.- Section 2 of the Powers of Attorney Act cannot override the specific provision of a statute which requires that a particular act should be done by a party in person. When the Code requires the appearance of an accused in a Court it is no compliance with it if a power of attorney holder appears for him. It is a different thing that a party can be permitted to appear through counsel. Chapter XVI of the Code empowers the Magistrate to issue summons or warrant for the appearance of the accused. Section 205 of the Code empowers the Magistrate to dispense with "the personal attendance of accused, and permit him to appear by his pleader" if he sees reason to do so. Section 273 of the Code speaks of the powers of the Court to record evidence in the presence of the pleader of the accused, in cases when personal attendance of the accused is dispensed with. But in no case can the appearance of the accused be made through a power of attorney holder. So the contention of the appellant based on the instrument of power of attorney is of no avail in this case."

In the present matter, the learned Additional Sessions Judge noted that present proceeding, the proceeding for recovery of maintenance amount was pending against the petitioner husband, and even arrest warrants were issued against him but instead of appearing before the Court

personally to avoid his arrest in the said proceeding, his power of attorney holder had appeared before the Court seeking to quash the order of maintenance, which had already become final. The learned Additional Sessions Judge also noted that in view of the settled position of law, the power of attorney holder could not be allowed to represent the party, who was required to remain present personally before the Court and against whom the arrest warrant was also issued.

5. Taking into consideration the legal position laid down by the Supreme Court in T.C.Mathai (Supra), I find that the Courts below were perfectly right in coming to the conclusion that in the given circumstances and the facts, the power of attorney holder could not be allowed to appear and represent the petitioner. The application filed by the power of attorney holder was nothing but a ploy to avoid the arrest of the petitioner for non-compliance of the order of the maintenance under section 125(3) of Cr.P.C. In such circumstances I find no substance in the present petition.

5. Therefore, the petition stands dismissed summarily.

(J.H. BHATIA, J.)